80-806

Supreme Court, U.S.
FILED
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MICHAEL RODAK, JR., CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1980

In Re Joseph L. Drociak

Joseph L. Drociak, Appellant

On Appeal from the Supreme Court
of New Hampshire

Jurisdictional Statement

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and

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November 17, 1980

No. _____

In the

Supreme Court of the United States

October Term, 1980

In Re Joseph L. Drociak

Joseph L. Drociak, Appellant

On Appeal from the Supreme Court

of New Hampshire

Jurisdictional Statement

Joseph L. Drociak, the appellant, appeals from the final decision of the Supreme Court of New Hampshire, dated August 21, 1980, and prior orders relating to the appellant, which denied appellant's admission to the New Hampshire Bar, despite his challenge that, on its face and as applied to him, the residency requirement of RSA 311:2 and N.H. Supreme Court Rule 15 violated the Privileges and Immunities Clause of Article IV and that the Court's action

infringed upon his rights to equal protection and due process of law guaranteed by the Fourteenth Amendment of the Constitution of the United States.

QUESTIONS PRESENTED

1. Whether in its exclusion of the appellant from the New Hampshire Bar, based solely on his lack of New Hampshire residence, the residency requirement of RSA 311:2 and N.H. Supreme Court Rule 15, on its face and as applied to him, violates the Privileges and Immunities Clause of Article IV (as applied to the States through the Fourteenth Amendment) and appellant's rights to equal protection and due process of law under the Fourteenth Amendment of the Constitution of the United States.

2. Whether in failing to notify the

appellant in a timely manner of a change in the period within which he had to take the oath of office after successfully passing the State's bar examination, the Supreme Court of New Hampshire denied the appellant his rights to equal protection and due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States .

LIST OF ALL PARTIES

Joseph L. Drociak, Esq., Appellant
7627 So. Western Avenue
Los Angeles CA 90047

State of New Hampshire, Appellee
Office of the N.H. Attorney General
State House Annex
Concord NH 03301

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ORDERS DELIVERED IN COURT BELOW

None of the orders of the Supreme Court of New Hampshire relating to the appellant were reported.

Copies of the orders are provided in the Appendix, pp.28-33, #1-6.

JURISDICTIONAL STATEMENT

In reply to appellant's request to take the oath of admission, the initial order of the Supreme Court of New Hampshire, dated May 21, 1962, allowed the appellant to be admitted to the New Hampshire Bar on June 5, 1962, only if he was a bona fide resident of New Hampshire at that time. (Appendix, p. 28, #1). Since he was not then a resident, he did not so appear to take the oath.

The appellant again requested

admission in September, 1977. The Supreme Court of New Hampshire denied the request in a letter of September 16, 1977. (Appendix, p. 40, #11 & p. 29, #2).

The appellant promptly requested that the Court inform him of the grounds for the denial of admission. (Appendix, p. 42, #12). In reply he was sent a form entitled "In re Petitions for admission to the New Hampshire Bar on Motion", informing him, inter alia, that all petitions for admission on motion filed since June 3, 1977, would be considered "probably in late summer or early fall of 1978". (Appendix, p. 29, #3). [Since about June, 1977, the Supreme Court of New Hampshire has not admitted out-of-state attorneys on motion.]

When he had heard nothing from the Court by November, 1978, the appellant retained counsel, who submitted a Motion to Take Oaths, dated October 12,

1979, with Affidavits, Exhibits and a Memorandum of Law. Prior to a decision on the Motion, appellant's counsel filed a Supplementary Memorandum of Law, dated February 22, 1980.

By letter of May 2, 1980, the Court denied appellant's request to take the oath of admission. (Appendix, p. 31, #4).

Appellant's counsel submitted a Motion for Clarification and Reconsideration, dated May 20, 1980. The Court responded by letter of June 13, 1980 (Appendix, p. 32, #5).

Following the suggestion of the Clerk of Court, appellant's counsel submitted a letter of June 20, 1980, elaborating upon appellant's request for reconsideration. (Appendix, p. 42, #13). The Court, however, by letter of August 21, 1980, stated its intent to take no further action. (Appendix, p. 33, #6).

This appeal is being docketed in

this Court within 90 days from the August 21, 1980, final order, Notice of Appeal having been filed with the Supreme Court of New Hampshire on November 13, 1980. (Appendix, p. 33, #7). The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257 (2).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

Constitutional Provisions:

Article IV, Section 2, Clause 1, United States Constitution.

Fourteenth Amendment, Section 1, United States Constitution.

Statutes:

Chapter 311, Sec. 2, N.H. Revised Statutes Annotated (1961).

Chapter 311, Sec. 7, N.H. revised

Statutes Annotated (1980).

Rules:

N.H. Supreme Court Rule 15 (1961) and its successor Rule 42.

****

[The text of these constitutional provisions, statutes and rules are set forth in the Appendix, pp. 47+, #15.]

STATEMENT OF THE CASE

While the Supreme Court of New Hampshire gave no response to the appellant's suggestion that a Stipulation of Facts be drafted for purposes of this appeal (Appendix, p. 42, #13), the relevant facts appear undisputed and may be fairly summarized as follows:

1. Mr. Drociak was born and raised in Manchester, New Hampshire. He went to both high school and college

there and left only for graduate study at George Washington University and law school at Georgetown University Law Center between 1957 and 1961.

2. He returned to his home in Manchester about the beginning of June, 1961, to study for the New Hampshire bar examination, which he took on June 21-23, 1961.

3. In about July, 1961, he went to California on vacation and stayed at his aunt and uncle's house. When he heard in August that he had passed the examination, he telephoned Mr. George Shovan, the then-Clerk of the Supreme Court of New Hampshire, and explained that he lacked the funds to fly back to New Hampshire from California for the August 30, 1961, swearing-in ceremony.

4. Mr. Shovan replied, in effect, that he should not be concerned, that he could return at any time and take

the oath, i.e. that there was no statute of limitations on the right to be sworn-in. (Appendix, Clerk's Affidavit, p. 35, #8, para. 7). Relying upon Mr. Shovan's assurance, Mr. Drociak remained in California.

5. In May, 1962, he requested an opportunity to take the New Hampshire oath of office since he was contemplating moving back to New Hampshire. (Appendix, p. 39, #9).

6. Mr. Shovan informed him that he could take the oath in June, 1962, but only if he was a bona fide resident of New Hampshire on that date. (Appendix, p. 28, #1).

7. Since he was not a New Hampshire resident in June, 1962, and relying upon Mr. Shovan's statement that there was no statute of limitations on his right to be sworn in, Mr. Drociak informed the Court that he would not

appear at the June, 1962, Court session. At this time he was qualified for admission to the New Hampshire Bar in every respect except residency.

8. Mr. Drociak again applied to take the oath of office in September, 1977 since he had friends, family and potential legal business in New Hampshire. (Appendix, p. 40, #11). At this time he was still a California resident. He had been admitted to the California Bar in 1964, and has to the present continued to practice in California. [While there was some question as to statements made by the appellant in his application to take the California Bar examination, he has explained the statements to the Supreme Court of New Hampshire. Further, his file was referred to the New Hampshire Committee on Character and Fitness in November, 1977, and he heard no objection to his character. (Appendix,

p. 47, #14). He is and always has been a member in good standing of the California Bar.]

9. His September, 1977 request was denied without any stated grounds. (Appendix, p. 29, #2). When he promptly wrote the Court, requesting reasons for the denial, he merely was sent a form which stated, inter alia, that all petitions for admission on motion would be acted upon probably by late summer or early fall of 1978. (Appendix, pp. 29, #3).

10. When he had heard nothing by November, 1978, he retained counsel who filed a Motion to Take Oaths, various affidavits and other exhibits, and a Memorandum of Law in October, 1979, and a Supplementary Memorandum of Law in February, 1980. It was in these pleadings and papers that the appellant raised the unconstitutionality of the residency requirement of RSA 311:2 and N.H. Supreme Court Rule 15 on its face and as applied

to him.

11. In a May 2, 1980, letter the Court indicated to the appellant for the first time that it did not approve requests to take the oath of admission "where several years have intervened between passing the bar examination and the time an applicant wishes to take the oath." (Appendix, p. 31, #4). This statement was in direct conflict with the statement of the former Court Clerk who had indicated that there was no such time limit.

12. Also about this time the Court issued its first public promulgation of the new policy in amending N.H. Supreme Court Rule 42 (the successor to Rule 15) to provide that one must take the oath of office within two years of passing the bar examination lest he otherwise be required to retake the examination. The amendment, however, was

not applied to the appellant's case. (Appendix, p. 32, #5).

13. Consequently, appellant's counsel submitted a Motion for Clarification and Reconsideration in May, 1980, and a letter in June, 1980, in which he raised the question whether such action by the Court violated the appellant's rights to equal protection and due process of law. He called the Court's attention to the fact that the Court until this time had never informed the appellant of the change in policy in taking the oath of office, of the consequences of his failure to do so, or of the reasons for the change. Counsel further called the Court's attention to the vagueness of the requirement that one take the oath within "several years" after passing the bar examination. Additionally, he requested a hearing on the matter.

14. By its letter of August 21, 1980, the Court indicated its intention to take no further action in the matter, which decision prompted this appeal.

THE QUESTIONS ARE SUBSTANTIAL

I. Residency Requirement.

A. RSA 311:2 and N.H. Supreme Court Rule 15 are Unconstitutional on Their Face.

1. Jurisdictional Conflict.

The constitutionality of residency requirements such as those found in RSA 311:2 and N.H. Supreme Court Rule 15 have recently created a serious jurisdictional conflict which has deepened in recent months.

Until November, 1979, most courts had held that residency requirements for admission to the bar were not unconstitutional per se, i.e.

that such requirements constituted appropriate means by which States could investigate the moral character and fitness of the attorneys they were admitting. The only question was typically whether or not the duration of the residency requirement was reasonable. Webster v. Wofford, 321 F.Supp. 1259 (DC GA 1970); Suffling v. Bondurant, 339 F.Supp. 257 (DC NM 1972), aff'd 409 U.S. 1020, 34 L.ed. 2d 312. The longer one was required to remain a resident prior to admission, the less likely the requirement was to stand constitutional scrutiny. Golden v. State Bd. of Law Examiners, 452 F.Supp. 1082, at 1086 (DC Md 1978), app. dism. 614 F. 2d 943.

The situation changed, however, in November, 1979, when the New York Court of Appeals unanimously struck down the state's six-month residency requirement for bar applicants as

violative of the Privileges and Immunities Clause of the U.S. Constitution. Matter of Gordon, 48 NY 2d 266 (1979). A significant aspect of the decision was that under the Privileges and Immunities Clause the duration of the residency requirement, however long or short, was not a basis for the holding. In other words, any denial of admission to otherwise qualified attorneys,

"based solely on their state of residence...works an unconstitutional discrimination against nonresidents." 48 NY 2d at 275.

The Court reached this result based in large part on Hicklin v. Orbeck, 437 U.S. 518, 57 L.ed. 2d 397 (1978), which laid down a tough test for determining whether a state's discrimination against nonresidents can be justified. See also Troyer v. Town of Babylon, 483 F. Supp. 1135, at 1140 (DC

NY 1980) which followed the Gordon decision.

Hicklin, supra, has been subsequently supported by other cases that have discouraged states' attempts to curb the free flow of commerce among the states, especially if protectionist motives were indicated. See Philadelphia v. New Jersey, 437 U.S. 617, 57 L.ed. 2d 475 (1978).

While the New York Court acknowledged the State's interest in assuring the competency and character of attorneys in the State, it found a number of less drastic and constitutionally permissible means of meeting this objective.

In May of 1980 a Federal District Court for Wisconsin examined the constitutionality of the Wisconsin statute requiring that an applicant for admission to the Bar be a resident at the

time of admission. Canfield v. Wis. Bd. of Attys. Professional Comp., 490 F.Supp. 1286 (DC Wis 1980).

While the Court found the Gordon decision persuasive on its merits, it felt bound by Wilson v. Wilson, 416 F. Supp. 984 (DC Ore. 1976), which upheld Oregon's requirement that an applicant be a resident at the time of admission since the Wilson case had been given summary affirmance by this Court at 430 U.S. 925, 51 L.ed.2d 768 (1977). The Canfield Court stated:

"A summary affirmance by the Supreme Court of the United States is a disposition on the merits and lower courts are bound by it." 490 F.Supp. at 1289.

The Canfield Court believed that the challenge to a residency requirement as violative of the Privileges and Immunities issue had been raised and

rejected by the summary affirmance in Wilson, supra. It thus speculated as to why the Gordon Court did not feel similarly bound by Wilson, supra. 490 F.Supp. at 1290.

The Supreme Court of Alaska was not as puzzled by the Gordon holding as was the Canfield Court. It adopted the Gordon rationale as recently as October 16, 1980. Sheley v. Alaska Bar Assn., (49 U.S. L.W. 2273, 10/28/80). The Court therein struck down the state's 30-day residency requirement for admission to the Alaskan Bar as being in violation of the Privileges and Immunities Clause.

Clearly the need exists to clarify the meaning of Hicklin v. Orbeck, supra, and the summary affirmance of the Wilson, supra. The time has come to determine wnether a residency requirement for purposes of admission to a state bar violates the Privileges and Immunities

Clause of Article IV, Sec. 2, Cl. 1, applicable to the States through the Fourteenth Amendment, Sec. 1.

2. Broad Application of Question. Any determination of the constitutionality of a state bar residency requirement extends well beyond the fate of Mr. Drociak. Given the increasingly frequent movement of lawyers and other professionals across state borders and the growth of "national" law and other professional firms, time will not bury the issue. As seen in the recent cases mentioned above, the conflict among jurisdictions is increasing rapidly.

B. Unconstitutional Application of RSA 311:2 and N.H. Supreme Court Rule 15.

Even if RSA 311:2 and N.H. Supreme Court Rule 15 were not found to violate the Privileges and Immunities Clause, they were applied to the appellant so as to violate his rights to

equal protection and due process of law guaranteed by the Fourteenth Amendment of the Constitution of the United States.

The Supreme Court of New Hampshire has denied his admission to the Bar even though he had actually met the residency requirement. Both statute and rule require only that he be or file a statement of intent to become a New Hampshire resident on application to take the bar examination. He in fact was a New Hampshire resident both before and after applying to take the bar examination.

RSA 311:2 states, inter alia, that:

"Any citizen...on application to the Supreme Court shall be admitted to practice as an attorney." (Underlining added).

The Supreme Court of New Hampshire has construed the statute through Rule 15 to mean that any New

Hampshire resident or one who files a statement of intention to become a resident "shall be eligible to apply for examination...." (Underlining added).

Thus under both statute and the rule, the only time New Hampshire residency is in issue is upon application to take the bar examination.

Once one establishes New Hampshire residency or files an intent to become a resident upon application to take the examination, nothing in the law requires that he remain a New Hampshire resident for one year, six months or, as the Court required herein, until he takes the oath of office.

Mr. Drociak was a New Hampshire resident before, during and even after taking the bar examination in 1961, thereby meeting the residency requirement. Nevertheless, the Supreme Court of New Hampshire ignored the

statute and its own rule and required the appellant to be a New Hampshire resident on the date he was sworn in, thereby depriving him of the right to take the oath, a right which he had already attained.

As the following scenario shows, application of the statute and rule so as to require an applicant to be a New Hampshire resident on the date he takes the oath of admission does not assist the State in its lawful power to ensure the proper character and fitness of New Hampshire lawyers:

Lawyer A is a nonresident until the very date of the swearing-in ceremony. Within a week after the ceremony he leaves New Hampshire to establish residency elsewhere. While his prolonged absence from the State prior to the ceremony in no way assists the bar authorities in determining his character

and fitness to practice law, he is qualified to be admitted.

Lawyer B, on the other hand, has lived in New Hampshire all of his life; his character and fitness are well-known to the community in which he lives. He passes the bar examination, but the day before the oath of admission is to be administered, his employer requires him to move to another state. The Court's application of the statute and rule, would disquality him for admission.

Under such circumstances what possible rational connection exists between the residency requirement and the State's interest in licensing only competent attorneys of good moral character? Schware v. Bar Examiners, 353 U.S. 232, at 239, 1 L.ed. 21 796, at

801-802 (1957).

II. Lack of Notice of Time Change.

Notice is the most fundamental right afforded by the equal protection and due process of law clause of the Fourteenth Amendment. Goldsmith v. United States Board of Tax Appeals, 270 U.S. 117, at 123, 70 L.ed. 494, at 497 (1926).

While the necessity for procedures such as the right to confront one's accusers and to cross-examine witnesses may vary from case to case depending upon the circumstances, there is virtually no instance in which a State may deprive an individual of his rights to life, liberty or property without at least notice thereof. Annotation, 98 L.ed. 851, at 855.

It has been recognized that the right of an attorney to practice his profession is not a matter of grace, but

of right for one who is qualified by his learning and his moral character. Baird v. St. Bar of Arizona, 401 U.S. 1, at 8, 27 L.ed. 2d 639, at 648 (1971). Moreover, denial of that right can only occur after the State has afforded an applicant procedural due process. Willner v. Committee on Character & Fitness, 373 U.S. 96 at 102, 10 L.ed. 2d 224 at 229 (1963), mot. for clar. den. 375 U.S. 950.

In the case of Mr. Drociak, he had understood from the former Clerk of the Supreme Court of New Hampshire that he could return at any time without limitation to take the oath of office, provided he was a New Hampshire resident at the time.(Appendix, Clerk's Affidavit, p. 35, #8, para. 7).

However, at some point between the time at which the former Clerk made this statement and the Court's letter of May 2, 1980, the Court changed its policy

so that requests to take the oath of admission were not approved "where several years have intervened between passing the bar examination and the time an applicant wishes to take the oath." (Appendix, pp. 31, #4).

The Court never notified the appellant in a timely manner of this change nor of the consequences of his failure to take the oath within "several years". By the time the Court did notify him of the change, it further informed him that he had already been precluded by the passage of "several years" from taking the oath. At this time the Court was no longer admitting out-of-state attorneys on motion. Consequently, it indicated that his only alternative would be to retake the bar examination, an option which presented considerable financial and practical hardship for him.

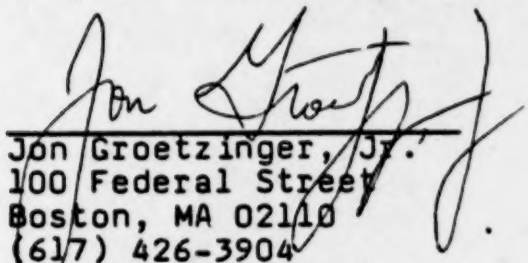
Even if the Court had notified

him of the change in timely fashion, the requirement that he take the oath within "several years" of having passed the bar examination was so vague as to prevent the appellant or any other reasonable person from determining the time within which to act. The vices of such due process vagueness have been previously recognized. Cramp v. Board of Public Instruction, 368 U.S. 278, 7 L.ed. 2d 285 (1961); Law Students Research Council v. Wadmond, 401 U.S. 154, 27 L.ed. 2d 749 (1971), (Mr. Justice Marshall's dissent).

III. Conclusion.

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,



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APPENDIX

N.H. SUPREME COURT ORDERS [LETTERS] ON APPEAL:

#1

[Letterhead of Clerk of N.H. Supr. Court]

1962
May 21

Mr. Joseph L. Drociak
2325 Ocean View Avenue
Los Angeles 57, California

Dear Mr. Drociak:

In accordance with our telephone conversation of May 11, 1962, you may be admitted to the bar of this state when the Court next convenes in regular session, June 5, at 10 A.M., provided you are a bona fide resident of this state on that date.

On the question of residence, this office has a communication dated May 16, 1962 from the Assistant Secretary of the Committee of Bar Examiners for the State Bar of California, disclosing that you informed that Committee that "After graduation from law school I came to California and have taken permanent employment as a claims representative with the Aetna Ins. Co. Have also rented an apartment and have given up N.H. residence."

You informed me in your telephone conversation that you have continued to maintain your domicile in New Hampshire and that you presently have a domicile here.

Will you kindly explain by return air mail this apparent conflict on the question of your bona fide intention of making New Hampshire your home.

Very truly yours,

[George O. Shovan]

GOS/R

****

#2

[Letterhead of N.H. Supr. Court]

1977
September 16

Joseph L. Drociak, Esq.
7627 South Western Avenue
Los Angeles, California 90047

Dear Mr. Drociak:

Your request by letter dated "September 1977" that you be admitted to the New Hampshire bar by reason of having passed the New Hampshire bar examination in 1961 has been denied.

Very truly yours,
[George S. Pappagianis]
George S. Pappagianis

GSP/drc

****

#3

STATE OF NEW HAMPSHIRE
SUPREME COURT OF NEW HAMPSHIRE

In re Petitions for Admission to the New Hampshire Bar on Motion

On June 3, 1977, the Supreme Court of New Hampshire established a

Committee on Character and Fitness and prescribed that each petitioner for admission to the bar must pay one hundred dollars ($100) for the Committe[e]'s use in its investigation of the petitioner's character and fitness.

All petitions for admission on motion filed since June 3, 1977, will be considered and acted upon by the court next year, probably in late summer or early fall.

The sum of the fees payable to this office by a petitioner for admission on motion is $375, of which $250 is retained by the state and $125 is forwarded to the National Conference of Bar Examiners.

A new petition-for-admission-on-motion form and a questionnaire are being processed for final review. Your name and address are being retained in our files as one who is to receive the new form, the questionnaire, and any other pertinent material, and we will send them to you as soon as they are available.

****

#4

[Letterhead of N.H. Supr. Court]

May 2, 1980

Jon Groetzinger, Jr., Esq.
1 North Main Street
Derry, N.H. 03038

Michael G. Gfroerer, Esq.
Barto and Gfroerer
6 Loudon Road
P.O. Box 468
Concord, N.H. 03301

Re: No. 79-323 In re Joseph L. Drociak

Gentlemen:

The Court does not approve requests to take the oath of admission where several years have intervened between passing the bar examination and the time an applicant wishes to take the oath. The Court is reviewing its policy on admission on motion to the Bar.

Should Mr. Drociak desire to become admitted by taking the bar examination this summer, the Court will permit him to apply as late as May 30, 1980. Enclosed is a bar examination application, together with an information sheet. The fee for the Character and Fitness investigation will be waived, but the exam fee of $75. must be submitted at the time his application is filed.

Sincerely,
[Ralph H. Wood]
Ralph H. Wood

rhw/cab
Enclosure

****

#5

[Letterhead of N.H. Supr. Court]

1980
June 13

Jon Groetzinger, Jr., Esq.
100 Federal Street
Boston, MA 02110

Michael G. Gfroerer, Esq.
Barto and Gfroerer
6 Loudon Road, P.O. Box 468
Concord, NH 03301

Re: No. 79-323 In re Joseph L. Drociak

Gentlemen:

This will respond to your "Motion" dated May 20, 1980. My letter of May 2, 1980 was the equivalent of an order of the court. It was not based upon the recent change to Rule 42 but rather upon past practice of the court in requiring re-examination whenever several years have passed following the taking of the examination without the applicant's having established residency and taken the oath.

Very truly yours,
[Ralph H. Wood]
Ralph H. Wood

RHW/jd

****

#6
[Letterhead of the N.H. Supr. Court]

August 21, 1980

Jon Groetzinger, Jr., Esq.
100 Federal Street
Boston, Massachusetts 02110

Re: 79-323 In re Joseph L. Drociak

Dear Mr. Groetzinger:

The Court has instructed me to inform you that it has reviewed the contents of your letter of June 20, 1980 addressed to the Clerk and that it intends to take no further action in this matter.

Very truly yours,
[Ralph H. Wood]
Ralph H. Wood

rhw/cab
cc: Michael G. Gfroerer, Esquire

****

NOTICE OF APPEAL:

#7
In the Supreme Court of the
State of New Hampshire

In re Joseph L. Drociak No. 79-323

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that Joseph L. Drociak, the appellant above-named, hereby appeals to the Supreme Court of the United States from

the final decree of the Supreme Court of the State of New Hampshire, dismissing his motions to be admitted to the New Hampshire Bar, entered on August 21, 1980, and all prior orders relating to the appellant.

This appeal is taken pursuant to 28 U.S.C. Sec. 1257 (2).

[Jon Groetzinger, Jr.]
Jon Groetzinger, Jr.
and
Michael G. Gfroerer
Counsel for Appellant

****

In the Supreme Court of the
State of New Hampshire

In re Joseph L. Drociak No. 79-323

PROOF OF SERVICE AND
NOTARIZED STATEMENT OF MAILING

I hereby certify that an original of appellant's Notice of Appeal To The Supreme Court Of The United States was mailed by certified first class mail, postage prepaid, return receipt requested, by me to the Clerk of the Supreme Court of the State of New Hampshire on this 13th day of November, 1980, at the main U.S. Post Office in Post Office Square, Boston, MA.

I further certify that three copies of said Notice and three copies of this Proof of Service were mailed ~~by~~ certified first class mail, postage prepaid, return receipt requested, by me to the Office of the New Hampshire Attorney General, State House Annex,

Concord, N.H. 03301 on this 13th day of November, 1980, at the main U.S. Post Office in Post Office Square, Boston, MA.

To my knowledge said mailings took place within the permitted time, in compliance with U.S. Supreme Court Rules, and were served upon all parties.

[Jon Groetzinger, Jr.]
Jon Groetzinger, Jr.
100 Federal Street
Boston, MA 02110
(617) 426-3904

[Oath, notary signature and seal]

****

OTHER MATERIAL:

#8
Clerk's Affidavit:

AFFIDAVIT

State of New Hampshire)
County of Merrimack)ss:

I, George O. Shovan, being duly sworn, depose and say that:

1. I currently reside on Little Sunapee Road in New London, New Hampshire.

2. I was Clerk of the New Hampshire Supreme Court from May 1, 1933 until February 1, 1970.

3. As Clerk I was responsible for receiving petitions for admission to the bar examination and received one such petition from Joseph L. Drociak on May 11, 1961. Mr. Drociak's petition stated

that he was residing at 315 Manchester Street, Manchester, New Hampshire.

4. On May 15, 1961 I wrote to Mr. Drociak informing him that his application had been approved by the Court, subject to his furnishing a certificate of graduation from law school, which he subsequently supplied.

5. Mr. Drociak took the New Hampshire bar examination on June 21, 22, and 23, 1961 and successfully passed.

6. During a telephone conversation on or about December 4, 1978 with Jon Groetzinger, Jr., Mr. Drociak's attorney, he stated that his client had told him the following, to the effect that:

While in California in August, 1961, Mr. Drociak learned that he had passed the New Hampshire bar examination and telephoned me soon after at the Clerk's office. During the conversation he stated that he was in California and, lacking funds, would find it difficult to return to New Hampshire in time for the August 30, 1961 swearing in ceremony. Thereupon, I told him not to worry, that he could return and be sworn in at any time in the future and that there was no time limit on this right to be sworn in.

7. While I do not remember the specific telephone call from Mr. Drociak, I often received such calls from examinees who had passed the bar examination but who had gone off on a vacation, honeymoon or into the service and were consequently unable to be present to take the oath on the appointed day. I would tell such persons in effect that their absence from a particular

swearing in ceremony did not disqualify them from subsequently taking the oath on the first Tuesday of each month, and that there was no time limit within which to take the oath. I often indicated there was a two-pronged test for admission: 1) qualification (i.e. passing the bar examination) and 2) New Hampshire "citizenship" (this statutory language has been interpreted to mean "residency"). If one was not a New Hampshire resident on the date he or she applied to take the examination, the Court would allow the person to graduate from law school and establish a bona fide residency in New Hampshire. New Hampshire residency must exist on the date the oath was taken. Therefore, were Mr. Drociak currently to become a New Hampshire resident, he could take the oath and be admitted.

8. On August 28, 1961 I wrote to Mr. Drociak informing him as to much of the above, specifically stating in part that:

"if you are unable to be present at that time [i.e. August 30, 1961 at 10 A.M.] you may upon notice to this office be admitted on the first Tuesday of each month at 10 A.M. when the Court holds its regular sessions, provided you are a bona fide resident of this state when you present yourself for admission."

9. Subsequently in a letter to the California Committee of Bar Examiners, dated December 12, 1961, I stated that Mr. Drociak had not yet been admitted to the New Hampshire bar

"for the only reason that he has not qualified as a bona fide resident of this state."

10. On May 21, 1962 I wrote a letter to Mr. Drociak confirming a May 11, 1962 telephone conversation which I had had with him. In the letter I stated that he may be admitted to the New Hampshire bar on June 5, 1962 at 10 A.M.

"provided you are a bona fide resident of this state on that date."

11. In letters dated May 22, 1962 and August 7, 1962 respectively, I informed the California Committee of Bar Examiners that Mr. Drociak maintained a domicile in Manchester, New Hampshire, but was currently a California resident, thereby distinguishing between domicile and residence.

12. This Affidavit is made in conjunction with Mr. Drociak's attempts to be admitted to the New Hampshire bar. Copies of correspondence referred to herein are attached hereto as an exhibit.

[George O. Shovan]
George O. Shovan, Deponent

[Oath and Notary signature and seal-January 16, 1979]

****

Appellant's Requests for Admission to the Bar:

#9

2325 Ocean View Ave.
Los Angeles 57, Calif.
May 14, 1962

State of New Hampshire
Supreme Court
Concord, New Hampshire

Dear Mr. Shovan:

Confirming our recent telephone conversation please be advised that I was a successful candidate on the 1961 New Hampshire Bar Examination, however due to my location as a claim representative of the Aetna Casualty & Surety Co. I was unable to be present to take the oath for admission to the Bar.

I am returning to New Hampshire on June 1, and respectfully request that I be permitted to take the oath on [T]uesday, June 5 in open court when the court holds it[']s regular session.

I am a native of Manchester and a domiciliary of New Hampshire having resided in Washington, D.C. while in attendance at Georgetown Law Center and in Los Angeles, Calif. while employed as a claim representative for the Aetna Casualty & Surety Co. I am a registered voter in New Hampshire and have a joint interest in real property located in Manchester.

If any additional information is necessary, please advise.

Thanking you for your cooperation in this matter.

Sincerely yours,
[Joseph L. Drociak]
Joseph L. Drociak

****

#10
2325 Ocean View Ave.
Los Angeles 57, Calif.
May 31, 1962

Mr. George O. Shovan
State of New Hampshire Supreme Court
Concord, New Hampshire

Dear Mr. Shovan:

As per our recent telephone conversation, this is to inform you that I shall not be present on June 5 to take the oath as due to my present location I would not qualify as a bona fide resident of New Hampshire at that time.

Thanking you for your cooperation in this matter.

Sincerely yours,
[Joseph L. Drociak]
Joseph L. Drociak

****

#11
September 1977

Clerk of the Supreme Court
of New Hampshire
Noble Drive
Concord, New Hampshire 03301

Gentlemen:

Pursuant to our recent telephone

conversation please be advised that I am a native of Manchester and a graduate of the Georgetown Law Center in Washington, D.C. I received my Law degree in June 1961. I successfully completed the New Hampshire State Bar exam in June 1961, however, I was not present that year to be sworn in as a member of the New Hampshire Bar. I discussed this matter at that time with the Clerk of the Supreme Court and was advised that I could be admitted at any time and there was not Statute of Limitation or other bar to my admission.

Relying on that representation, I did not return to New Hampshire to be admitted. Subsequently I took the California Bar examination which I successfully completed and was duly admitted to practise before the California Bar in 1964.

Since that time I have been actively engaged in the practice of Law in Los Angeles. However, I do return to New Hampshire periodically to visit family and friends and would at this time like to be admitted to the New Hampshire Bar and hereby request that I be allowed to take the oath so that I can practise Law in my home state.

Respectfully submitted,

JOSEPH L. DROCIAK
Attorney at Law

****

#12
September 23, 1977

George S. Pappagianis
Clerk of Court and
Reporter of Decisions
The State of New Hampshire Supreme Court
Supreme Court Building
Concord, N.H. 03301

Dear Mr. Pappagianis:

Thank you for yours of September 16, 1977. Would you please inform me on what grounds my request for admission to the New Hampshire Bar was denied, and what measures I would have to take in order to be admitted.

Very truly yours,

JOSEPH L. DROCIAK
Attorney at Law

JLD/at

****

Other Relevant Letters:

#13
[Letterhead of Jon Groetzinger, Jr.]

June 20, 1980

Ralph H. Wood, Clerk
New Hampshire Supreme Court
Supreme Court Building
Concord, NH 03301

Re: In re Joseph L. Drociak
No. 79-323

Dear Mr. Wood:

As you suggested in a telephone

conversation of June 16th, we are writing to elaborate on petitioner's reasons for requesting reconsideration by the Court of its decision in the above-captioned matter. You indicated that such elaboration could be submitted in letter form. We therefore request that the content of this letter be incorporated by reference in and as a part of petitioner's filings to date.

Petitioner had requested a hearing prior to being denied admission to the bar if there were any facts in dispute. Willner v. Committee on Character and Fitness, 373 US 96, 10 L ed 2d 224 (1963). The facts, however, do not appear to be in dispute and petitioner would be agreeable to submitting a Stipulation of Facts if the Court were to allow him to do so. Petitioner seeks such a stipulation or, if necessary, a hearing to establish a record and findings of fact for the purpose of taking an appeal to the U.S. Supreme Court. He has decided to take the appeal only after lengthy discussions and research. The method of stipulating to facts has been used in appeals in similar situations. Equitable Life Assur. Soc. v. Commissioner, 321 US 560, 561, 88 L ed 927, 929, reh den 322 US 767, 88 L ed 1593 (1944); Wilson v. Wilson, 416 F Supp 984, aff'd 430 US 925 (1977).

The grounds upon which petitioner intends to seek an appeal include, but are not limited to, the following:

I. Residency Requirement.

A. Constitutionality of Statute and Rules.

As stated in the Supplementary

Memorandum of Law, petitioner challenges the constitutionality of the residency requirement for admission to the New Hampshire bar contained in RSA 311:2 and rules issued pursuant thereto as violative of the Privileges and Immunities Clause of the U.S. Constitution, Art. IV, sec. 2, cl. 1. The constitutionality of such requirement under Art. IV is very much in question at present. The New York Court of Appeals recently held its residency requirement violative of the Privileges and Immunities Clause. Matter of Gordon, 48 NY 2d 266, 397 NE 2d 1390 (1979). However, on May 29, 1980 Judge Doyle of the Wisconsin Federal District Court disagreed with the New York decision and upheld Wisconsin's residency requirements against a Privileges and Immunities challenge, based upon Wilson v. Wilson, 416 F Supp 984, aff'd 430 US 925 (1977). Canfield v. Wisconsin Board of Attorneys Professional Competence, 48 USLW 2793 (June 10, 1980). See also Golden v. State Board of Law Examiners, 452 F Supp 1082, 1093 (USDC Md 1978) for a similar holding.

B. Unconstitutional Application of Statute and Rules.

Even if the statute and rules themselves do not infringe upon the Privileges and Immunities clause, the manner in which they were applied to petitioner unconstitutionally deprived him of equal protection and due process of law under the federal constitution. The statute and rules only require New Hampshire residency on application to take the bar examination, not on the date one is sworn in. Petitioner was a New Hampshire resident essentially from birth until well after he had passed the bar

examination. He had thus fulfilled the residency requirement and should not be deprived of the right to be admitted on account of the fact that he subsequently became a California resident.

II. Time Requirement.

Petitioner believes he has been denied his federal rights to due process and equal protection by the Court's ruling that too much time elapsed between his having passed the bar examination and his request to take the oaths. As was established in Mr. Shovan's Affidavit, the Court's policy in 1961 was that an applicant who had successfully passed the bar examination could return at any time to take the oaths and be admitted, so long as he was a New Hampshire resident. Mr. Drociak attempted to take the oaths in 1962; however, he was discouraged when Mr. Shovan again told him that he could not be sworn in unless he was a New Hampshire resident, which he was not at the time.

Based upon Mr. Shovan's assurance that he could take the oaths at any time and the perception that he had to be a New Hampshire resident, petitioner waited until September 1977 to again request admission. However, some time during this period the Court apparently changed its policy to require that one be sworn in within "several years" after passing the bar examination. Petitioner was never informed of this change nor of the consequences if he failed to take the oaths within a certain number of years. Nor was he ever informed of the reasons for such a policy change. In April 1980 the Court published its amendment to Rule 42 to require that the

oaths be taken within two years after passing the examination. Petitioner first learned of the change in policy around this time. Without any prior notice peitioner was thereby informed that his right to take the oaths was precluded.

Even if he had had prior notice of the change in policy, which he did not, the requirement that he be sworn in within "several years" would have been so vague as to prevent any reasonable person from determining the time limit within which to take the oaths.

*****

Petitioner respectfully requests that the Court in its reconsideration review the comments above in addition to matter previously submitted.

We look forward to hearing from you. If the Court reaffirms its ruling, we would appreciate the opportunity to submit a proposed Stipulation of Facts.

Thank you again for your attention in this matter.

Very truly yours,
[Jon Groetzinger, Jr.]
Jon Groetzinger, Jr.

[Michael G. Gfroerer MGG/JGJ]
Michael G. Gfroerer
Attorneys for Petitioner

JGJ/ld
cc: Joseph L. Drociak, Esq.
The Honorable George O. Shovan

****

#14
[Letterhead of N.H. Supr. Court]

1979
November 14

Jon Groetzinger, Jr., Esq.
1 North Main Street
Derry, NH 03038

Richard G. Gfroerer, Esq.
Barto and Gfroerer
6 Loudon Road
P.O. Box 468
Concord, NH 03301

Gentlemen:

Re: 79-323 In re Joseph L. Drociak

The supreme court has referred to the committee on character and fitness Joseph L. Drociak's motion to take oaths, exhibits, and memorandum of fact and law.

The committee will communicate with you as soon as is practicable.

Very truly yours,
[George S. Pappagianis]
George S. Pappagianis

GSP/jd
cc: [members of the committee]

****

#15
Constitutional Provisions, Statutes and Rules Involved:

Constitutional Provisions:
Article IV, Section 2, Clause 1,
United States Constitution:

"The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

Fourteenth Amendment, Section 1, United States Constitution:
"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statutes:
Chapter 311, Sec. 2, N.H. Revised Statutes Annotated (1961):
"Any citizen of the age of twenty-one years, of good moral character and suitable qualifications, on application to the Supreme Court shall be admitted to practice as an attorney."
(Statute has been amended, but without effect on this case to read:
"Any citizen of the age of eighteen years, of good moral character and suitable qualifications, on application to the supreme court shall be admitted to practice as an attorney.")

Chapter 311, Sec. 7, N.H. Revised Statutes Annotated (1980):
"No person shall be permitted commonly to practice as an attorney in court unless he has been admitted by the court and taken the oath aforesaid." [Text of oath is set forth in RSA 311:6].

Rules:
N.H. Supreme Court Rule 15 (1961):
"Any person who is a citizen of the United States and who is either a resident of the State of New Hampshire or

files a statement of intention to reside in the State of New Hampshire, shall be eligible to apply for examination provided he is possessed of the qualifications hereinafter provided."
[Rule 15 has been amended and renumbered; however, except for the abolition of the admission on motion procedure, the changes are without effect on this case:
"Rule 42 (1): All admissions to the bar shall be by examination only...."

****

"(3): Any person domiciled in the United States and who either is a resident of the State of New Hampshire or files a statement of intention to reside in the State of New Hampshire shall be eligible to apply for examination provided he is possessed of the qualifications hereinafter provided.

****

"(8) Except upon approval of the supreme court for good cause shown, the oath of admission required by RSA 311:6 must be administered within two years from the time the applicant has been notified of the successful passing of the bar examination or said examination must be taken again and passed."]

No. 80-806

Supreme Court of the United States

October Term, 1980

Joseph L. Drociak

v.

Supreme Court of New Hampshire

MOTION TO DISMISS AND/OR AFFIRM

THE STATE OF NEW HAMPSHIRE
NEW HAMPSHIRE SUPREME COURT

Office of the Attorney General

Gregory H. Smith
Acting Attorney General

Wilbur A. Glahn, III
Assistant Attorney General

208 State House Annex
25 Capitol Street
Concord NH 03301
(603) 271-3658

December 19, 1980

No. 80-806

Supreme Court of the United States

October Term, 1980

Joseph L. Drociak

v.

Supreme Court of New Hampshire

MOTION TO DISMISS AND/OR AFFIRM

The State of New Hampshire, acting on behalf of the New Hampshire Supreme Court (hereinafter referred to as "the State") moves, pursuant to Rule 16 of the Rules of this Court, for an order dismissing this appeal and/or affirming the orders of the New Hampshire Supreme Court appealed from in the Jurisdictional Statement of Appellant Joseph L. Drociak (hereinafter referred to as "the Appellant").

This motion is made on grounds that the Jurisdictional Statement does not present a substantial federal question; that all purported federal questions sought to be reviewed were neither timely nor properly raised nor expressly passed upon; that the orders below rested on an adequate non-federal basis; and that the questions upon which the cause depends are so unsubstantial as not to need further argument.

LIST OF ALL PARTIES

Joseph L. Drociak, Esquire, Appellant
7627 So. Western Avenue
Los Angeles, California 90047

State of New Hampshire, Appellee
Office of the Attorney General
208 State House Annex
25 Capitol Street
Concord, New Hampshire 03301

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ORDERS DELIVERED IN COURT BELOW

None of the orders of the New Hampshire Supreme Court in this matter is reported.

Copies of the orders and of additional materials are provided in the Appendix to the Jurisdictional Statement and in the Appendices to this Motion.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

Constitutional Provisions:

Article IV, Section 2, Clause 1, United States Constitution

Fourteenth Amendment, Section 1, United States Constitution

Statutes:

28 U.S.C. §1257(2)

NH RSA 311:2

NH RSA 311:6

NH RSA 311:7

Rules, New Hampshire Supreme Court:

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Rule 15 (1961)

The texts of these constitutional provisions, statutes and rules, with the exception of New Hampshire Supreme Court Rule 10 and 28 U.S.C. §1257(2), are set forth in the Appellant's Appendix. The remaining rules and statutes are set forth in the Appendices to this Motion.

QUESTIONS PRESENTED

1. Whether this appeal presents a substantial federal question timely

and properly raised, expressly ruled on below and which does not rest on an adequate non-federal basis so as to give this Court jurisdiction to review the orders of the New Hampshire Supreme Court either on appeal or by writ of certiorari?

2. Whether, assuming that an appeal properly lies in this Court, Appellant's claim that the orders of the New Hampshire Supreme Court deny federal rights under the Privileges and Immunities Clause of Article IV, Section 2, Clause 1 of the United States Constitution presents a question so substantial as to need further argument before this Court?

STATEMENT OF THE CASE

Appellant Joseph L. Drociak (hereinafter "Appellant") has filed this appeal seeking to invoke the jurisdiction of this Court to review Orders of the New Hampshire Supreme Court dated May 2, June 13 and August 21, 1980 respectively. See Appellant's Appendix (hereinafter D.App.) 4, 5, 6. These Orders, as well as an Order of that Court dated September 16, 1977 (D.App. 2 and 3) denied Appellant admission to the New Hampshire bar for the reason that he had passed the New Hampshire Bar examination in June, 1961, but had not presented himself to take the oath since that date.

On April 29, 1961, Appellant filed

an application for admission to the New Hampshire Bar. Appendix (hereinafter "N.H.App.") 1. That application required Appellant to indicate that he was or "intend[ed] to become" a New Hampshire resident on a date specified. Id. Appellant indicated that he was a resident. Id.

Although he passed the examination, Appellant then moved to California and did not appear for admission at the regularly scheduled admission in August, 1961. By letter dated August 28, 1961, Appellant was advised by the Court that he would be permitted to take the oath required for admission provided he was a "bona fide resident of th[is] state when you present yourself for admission." N.H.App. 2.

In May 1962, Appellant informed the New Hampshire Supreme Court that he was seeking admission to its bar based on domiciliary status in New Hampshire. N.H.App. 3. Although he indicated that he was returning to New Hampshire to take the oath, he never expressed any intent to become a resident. Id. Based on letters, telephone conversations and information that Appellant had become a resident of California in July, 1961 (N.H.App. 4, 5 and 6), the Court denied his 1962 request for admission for the reason that he was not then, and was unwilling to become, a bona fide resident at the time of admission. By letter dated May 31, 1962, Appellant confirmed this fact and his understanding that residency was a prerequisite to admission.

N.H.App. 7.

More than fifteen years then passed before the Court heard from Appellant. In September, 1977, he wrote to the then Clerk of the Court advising him that he was requesting admission because he returned to New Hampshire "periodically." D.App. 11. Although referencing a discussion with the former Clerk to the effect that he could be admitted "at any time" and that "there was no ... other bar to [his] admission," Appellant indicated no intention to become a resident of the State prior to the admission. On September 16, 1977, the Court denied Appellant's request. D.App. 2. Appellant then requested the reasons for the Court's decision, the steps he would have to take for admission, and apparently discussed

the matter with the Court Clerk. D. App. 12; N.H.App. 8. Following these communications, the Court advised Appellant of the means by which he could be admitted on motion. D.App. 3.

Appellant took no further action for over two years. On October 12, 1979, he filed a Motion to Take Oaths accompanied by extensive exhibits, affidavits and a memorandum of fact and law. Appellant's motion challenged the 1977 action of the Court and asserted two legal bases for his admission: (1) that the Court, through its earlier orders, had misconstrued NH RSA 311:2 by requiring residency at admission; and (2) that a residency at admission requirement violated his federal rights to equal protection,

due process of law, and interstate travel. N.H.App. 8. Appellant requested relief in the form of a hearing and an order allowing the oaths to be taken. Alternatively, he requested a declaratory ruling that if he became a New Hampshire resident he would be allowed to take the oaths and that "the lapse of time between his passing the bar and his request of September 1977 is ... in and of itself no bar to being allowed to take the oaths and practice law in this state." N.H. App. 9. Finally, Appellant sought an advisory opinion as to what he must do to take the oaths. Id.

Although Appellant filed an affidavit with this motion, nowhere in that affidavit or in any of the other pleadings and papers filed with the

Court did Appellant indicate any intention to become a resident of New Hampshire prior to administration of the oath.

On February 22, 1980, after the matter had been filed, Appellant amended his motion by a supplementary memorandum, which for the first time challenged the Court's requirement of residency at admission on a per se basis, i.e., as a violation of the privileges and immunities clause of Article IV of the United States Constitution. N.H. App. 10.

On May 2, 1980, the Court denied Appellant's motion, stating that it "does not approve requests to take the oath of admission where several years have intervened between passing

the bar examination and the time an applicant wishes to take the oath." D.App. 4. By that same notice, the Court offered Appellant an opportunity to take the 1980 examination.

On May 20, 1980, Appellant sought reconsideration of this 1980 Order. D.App. 5. By letter dated June 13, 1980, the Court advised Appellant that its earlier Order was based on the "practice of the court of requiring re-examination whenever several years have passed following the taking of the examination without the applicant's having established residency and taken the oath." Id.

On June 20, 1980, Appellant again sought reconsideration of the Court's denial of his motion. D.App. 13.

By Order dated August 21, 1980, the Court denied further consideration. D.App. 6. This appeal followed.

I. ARGUMENT

A. This Appeal Must Be Dismissed For Failure To Assert a Substantial Federal Question, In a Timely And Proper Manner, And Because The Decision Rests On An Adequate Non-federal Basis.

The facts surrounding Appellant's attempts to gain admission to the New Hampshire bar are these: In 1961, after passing the New Hampshire bar examination, Mr. Drociak moved to California. In 1961 and again in 1962, Mr. Drociak was advised by the Clerk of the New Hampshire Supreme Court that he would have to be a resident of New Hampshire in order to take the oath of admission required

by NH RSA 311:6 and 7. N.H.App. 2.[1] In 1962, he conceded that he could not meet this requirement as he was neither a domiciliary or bona fide resident of this State. N.H.App. 7. He was advised that he could take the oath with "no time limit" provided the condition of residency was met.

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[1]As the Clerk's Affidavit demonstrates, this was a prerequisite to admission based on an interpretation of New Hampshire statutes by the New Hampshire Supreme Court. D.App. 8, ¶7. This requirement was not applied only to Mr. Drociak, but to all bar applicants passing the examination, who were required to establish residency by listing an address or domicile within this State prior to the oath. At one time, this was done by requiring a mailing address; later, it was done by filing a form stating "Admission to the bar will not be permitted until an applicant proves good faith residency in the sense of domicile in New Hampshire." N.H.App. 11. The State does not know when this particular form began to be used. Currently, a residence form is required prior to taking the oath.

For sixteen years following the exam, Appellant did nothing to fulfill the prerequisite for admission. He neither practiced law in this State, belonged to the state bar association (as is required by New Hampshire's integrated bar) nor advised New Hampshire clients. Apparently, his interest in New Hampshire (other than familial ties) ceased and he practiced solely in California.

Fifteen years after being told that there was "no time limit" to take the oath, he requested that he be permitted to do so but, knowing that residency was a prerequisite, he evidenced no intent to become a resident in his letter of request. D.App. 1. Apparently, he discussed the grounds for his denial with the Court Clerk

at that time and was told that the reason for denial was the timeliness of his request. N.H.App. 8. Although he was given an opportunity for admission on motion in spite of the untimeliness of the motion, he did not avail himself of that opportunity.

Faced with a final decision of the Court denying his admission request which, according to Appellant's own papers, he knew was based impliedly or specifically on the New Hampshire Court's interpretation of his timeliness in requesting admission (the earlier Clerk's letters to the contrary notwithstanding), Appellant did nothing for a year. He then hired an attorney to seek review of that ruling, but his attorney did nothing for almost a year. When he did act,

it was only to attempt to raise the same issues in the New Hampshire Supreme Court for a second time. Quite properly, that attempt was denied.

It is obvious from the foregoing facts that any attraction to Appellant's claim in this Court that he has been denied due process by reason of "lack of notice of a time change" is superficial and "upon careful analysis, promptly fades and disappears entirely." Pennsylvania v. New Jersey, 426 U.S. 660, 667, 49 L.Ed.2d 124, 130 (1976) (Blackmun, J., concurring), citing Austin v. New Hampshire, 420 U.S. 656, 43 L.Ed.2d 530 (1975). Indeed, as Mr. Justice Blackmun noted in dissent in Austin, this is primarily a "lawyers' lawsuit." 420 U.S. at 669, 43 L.Ed.2d

at 540. Appellant was denied nothing by the Court's action in 1977; he waited too long to assert his interests, and when offered an opportunity to join the bar by admission on motion, did nothing. If Appellant suffers from the Court's application of a change in practice regarding the timeliness of his admission, it is by his own hand.

Furthermore, the foregoing facts conclusively demonstrate that this matter is not properly subject to review here either by appeal or by writ of certiorari. Appellant claims jurisdiction for this appeal under 28 U.S.C. §1257(2). But no such appeal lies because: (1) the questions are not timely or properly raised; (2) the judgment below rests on an adequate

non-federal basis; and (3) the federal question raised here was not expressly passed on. U.S. Supreme Court Rule 16.1(b). Each of these points merits further discussion.

With respect to timeliness, Appellant is approximately two years too late in reaching this Court. When his admission was denied in 1977, it was reasonable to assume, given his request that he be permitted to take the oath (D.App. 1), that the basis of that denial was his prolonged failure to appear to take the oath. Appellant admits as much in his 1979 memorandum. N.H.App. 8. That decision also might have implicated New Hampshire's interpretation of NH RSA 311:2, 6 and 7, given that Appellant expressed no intention whatsoever to return to

New Hampshire.

Pursuant to the rules of the New Hampshire Supreme Court, Appellant had ten days to request reconsideration of that order. NH RSA 490:App. R. 10 (1968). He did not do so. He then had "not more than 90 days after the entry of the judgment" to docket the appeal in this Court. See U.S. Supreme Court Rule 13, Moore's Federal Practice, Pamphlet 1980, at 831. See also U.S. Supreme Court Rule 12. He did not do so. This failure is an absolute bar to further proceedings in this Court, and the 1980 rulings of the New Hampshire Supreme Court simply reaffirming its 1979 decision (which have the effect of a finding merely that the earlier decision was res judicata) do not grant Appellant a

right to review. See Michigan v. Tyler, 436 U.S. 499, 512, n. 7, 56 L.Ed.2d 486, 500, n. 7 (1978).

By his inaction, Appellant is barred from proceeding under the Rules of this Court and to the extent that the Court treats the petition as a writ of certiorari, he is similarly barred. Indeed, Appellant should be barred for equitable reasons similar to those expressed in the doctrine of laches. In some ways, Appellant has proven the State's point regarding the need for a knowledgeable bar familiar with local procedures and rules. See Part I.B infra. His unfamiliarity with that practice is a contributory factor to preventing his appeal here.

The second and third reasons why Appellant's appeal should be dismissed

are both related to his failure to present a "substantial federal question." See U.S. Supreme Court Rules 16.1(b) and (c). The New Hampshire Supreme Court's rulings are based squarely on independent and adequate state law grounds. Moreover, Appellant's claim was not properly raised. Rule 16.1(b).

Before addressing those issues, however, there is a further independent basis for denying the appeal under Rule 16.1(c). The question Appellant wishes to raise, i.e., the validity of New Hampshire's residency requirement at admission under the Privileges and Immunities Clause, has already been specifically addressed by this Court in a decision on the merits. See Wilson v. Wilson, 416 F.Supp. 984 (D.Or. 1976), aff'd mem. 430 U.S.

925, 51 L.Ed.2d 768 (1977). While that decision does not bind this Court, Tully v. Griffin, 429 U.S. 68, 50 L.Ed.2d 227 (1976), Appellant has presented no reason why Wilson should be reviewed in this case.

For reasons more fully explained in Part I.B below, it is therefore manifest that the "questions on which the decision of the cause depends are so unsubstantial as to not need further argument," even assuming arguendo that issues involving the Privileges and Immunities Clause have been properly raised. That assumption, however, requires a complete avoidance of the decisions below, for there is no federal question properly before this Court.

Appellant has a heavy burden in

this Court. It is incumbent upon him to "show affirmatively" that this Court has jurisdiction. Memphis Natural Gas v. Beeler, 315 U.S. 649, 561, 86 L.ed. 1090, 1094. In doing so, he must demonstrate that the decision below is independent of and does not rest upon any tenable or adequate non-federal ground. That burden is not met "[w]here the highest court of the state does not deliver an opinion and it appears that the judgment might have rested upon a nonfederal ground." Stembridge v. Georgia, 343 U.S. 541, 547, 96 L.ed. 1130, 1134 (1952)(emphasis in original). Nor is it met if the decision below is ambiguous, possibly resting on both federal and nonfederal grounds, or if it does not appear on which ground the decision

rests. In such cases, if the non-federal ground is adequate to sustain the decision, this Court will not take jurisdiction. Lynch v. New York ex rel. Pierson, 293 U.S. 52, 54-55, 79 L.ed. 191, 192-193 (1934). Finally, Appellant must do more than show that a federal question was raised below; he must affirmatively demonstrate that the question was raised and "that it was necessary to the determination of the cause." Durley v. Mayo, 351 U.S. 277, 281, 100 L.ed. 1178, 1183 (1956).

Appellant's arguments are facially defective when measured against these standards. While asserting nothing about the judgments below, Appellant's principal contentions are that the State Court misapplied the state statute and/or its own rules by requiring

him to take the oath at admission (Juris. Stat. at 18-22) and by denying his request to take the oath as untimely. Id., at 23-26. The problem with these contentions is twofold. First, they amply demonstrate, as do the Supreme Court's orders, that the decisions below were not based on any federal question or claim of violation of federal rights. Rather, they were based squarely on the Court's interpretation of its own rules and practices. The Court simply ruled that the passage of fifteen years between the original examination and the request for admission was an unreasonably long period after which to claim a right to admission on examination, although it offered admission by motion. Nothing in the Court's decisions in

1977 or 1980 even suggest that a federal question was considered. In fact, the plain wording of the Court's orders implies the contrary. And since Appellant did not even raise a federal question in 1977, it would be difficult to argue that that decision rests on such a ground.

Second, Appellant himself does not dispute the fact that the decisions below rest on state law in his Jurisdictional Statement; he argues that the lower court's construction of its rules and of the state statute were incorrect. But this argument gets him nowhere, for the New Hampshire Supreme Court's interpretation of its own statutes, NH RSA 311:2, 311:6 and 311:7, to require residency at the time of admission, and of its own

rules, not only is a proper subject of determination by that Court, Ricker's Petition, 66 N.H. 207, 19 At. 572 (1890), Application of Appell, 116 N.H. 400, 359 A.2d 634 (1976), but is completely unreviewable here, either by appeal or certiorari. As this Court stated in Guaranty Trust Co. v. Blodgett, 287 U.S. 509, 513, 77 L.ed. 463, 465 (1933), when reviewing the construction by the state court of its own statutes

> [W]e are bound by the decision of that court as though the meaning as fixed by the court had been expressed in the statute itself in specific words.

Appellant has therefore presented no reviewable federal issue for this Court; he has only proven that the decisions below rest on independent

state grounds.[2]

No different result is required when reference is made to the 1980 orders of the Court. Although Appellant had raised constitutional issues

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[2]Although not reviewable here, Appellant's arguments concerning the Court's construction of NH RSA 311:2, 6 and 7 are disingenuous and plainly wrong. Appellant was advised nearly 20 years ago of the Court's interpretation of the rule regarding the residency at the time of the oath of admission. Until he raised the issue in his 1979 pleadings, Appellant never challenged that interpretation. Furthermore, even a superficial reading of NH RSA 311:2, 6 and 7 discloses that the determination that the words "citizen" in NH RSA 311:2 and "person" in NH RSA 311:7 requires residency at the time of the taking of the oath is reasonable. Appellant's position is simply that the Court had to adopt rules interpreting both sections 2 and 7 of Ch. 311 and that its failure to do so prohibits it from interpreting the language in section 7. This argument is totally unpersuasive since the New Hampshire Court is the final interpreter of its own statutes.

in his 1979 filings, the 1980 decisions are at best ambiguous as to the basis of the Court's decision. A far more reasonable interpretation of those orders is that they rest precisely on the same grounds as the 1977 denial, i.e., the Court's interpretation of a sixteen-year delay before requesting admission as being untimely. Once again, this hardly demonstrates that a federal question was necessary to the determination of the cause. See Durley v. Mayo, supra.

Appellant's only conceivable argument is that the decision below does not rest on an adequate state law ground. Here, Appellant must assert that the Court's decision on the untimeliness of his application "is so certainly unfounded that it may

properly be regarded as essentially arbitrary, or a mere device to prevent a review of the decision on the federal question." Enterprise Irrig. District v. Farmers Mut. Canal Co., 243 U.S. 157, 164, 61 L.ed. 644, 649 (1917). But any such claim (even if fairly inferred from the Jurisdictional Statement) is unpersuasive here. Can the Court's action be considered capricious in the face of a sixteen-year delay on the part of the Appellant in protecting his rights? The State thinks not. Can it be considered as essentially arbitrary where the Court offered an alternative route to Appellant, i.e., admission on motion, and he chose not to accept it? Again, the State does not think so. Was that action arbitrary where Mr. Drociak

made not one contact with the Court for fifteen years and never sought to inquire whether the practice described in Mr. Shovan's affidavit had changed? D.App. 8, ¶7. The answer must be no. This was not, after all, a brief absence for "vacation, honeymoon, or ... the service." This was a delay where the Appellant had become an active practitioner elsewhere and by his own inaction never sought to exercise whatever rights he gained as a result of the 1961 examination. If anyone acted in an "essentially arbitrary" manner, it was Mr. Drociak. Thus, the Court's ruling on state ground is adequate.

Finally, although Appellant raised constitutional issues in his 1979 filings, he did not properly do so. The State has already demonstrated

that the insertion of these issues was untimely. It was also improper, for in his 1979 Memorandum, Appellant did not challenge the state statutes as being void or unconstitutional per se. N.H.App. 8. Neither did his supplemental memorandum of law filed in February 1980 contain such an assertion. Rather, he simply asserted that his federal rights prevented an application of the statute to him.

This is not enough. For appeal purposes, it is necessary that the litigant make specific and plain in the state court his contention that the application of the statute to his particular circumstances would make the statute void under federal law. In the absence of such a claim, an adverse decision amounts to, at

most, a denial of his assertion of federal rights rather than a validation of the state statute and review cannot be had by appeal. Rohr Aircraft Corp. v. County of San Diego, 362 U.S. 628, 630, 4 L.Ed.2d 1002, 1004 (1960); Charlestown Fed. Savings and Loan v. Alderson, 324 U.S. 182, 185, 89 L.ed. 857, 860 (1945).

Based on the foregoing, this appeal must be dismissed or the judgment below affirmed. To paraphrase Mr. Justice Brennan's dissent in Baldwin, infra., it may be, as Appellant asserts, that the lingering death of residency rules began with the thrust of the blade in Hicklin, infra. and Gordon, infra. (But see Part I.B, infra.) But even if this is so, based on these facts this is not the case in which to draw

first blood.

B. The Questions Presented On Appeal Have Been Resolved By This Court And Are Unsubstantial And Therefore Require Dismissal Or Summary Affirmance.

Assuming arguendo that this Court should find that the constitutional issues addressed in Part I of Appellant's Jurisdictional Statement are properly before this Court, it should nevertheless dismiss this Appeal. The issues presented are not substantial and, in any event, have already been addressed by this Court. Canfield v. Wisc. Bd. of Attys. Professional Comp., 490 F.Supp. 1286 (W.D.Wisc. 1980); Wilson v. Wilson, 416 F.Supp. 984 (D.Or. 1976), aff'd. mem. 430 U.S. 925, 51 L.Ed.2d 768 (1977).

Appellant's argument that the orders

in this case are unconstitutional is based on Gordon v. Committee on Character and Fitness, 48 N.Y.2d 266, 397 N.E.2d 1309 (1979) and its interpretation of Hicklin v. Orbeck, 437 U.S. 518, 57 L.Ed.2d 397 (1978) and Baldwin v. Montana Fish & Game Comm., 436 U.S. 371, 56 L.Ed.2d 354 (1978). Arguing that Hicklin established a new "tough test" under the Privileges and Immunities Clause, Appellant asks this Court to reconsider a stream of cases upholding simple residency requirements, many of which have been affirmed by this Court. He presents no reason why Gordon or Hicklin requires a reversal of New Hampshire's requirement of simple residence at admission. Instead, he merely asserts that because of conflicting decisions following

Gordon, a "clarification" of Hicklin and Wilson is necessary in this case. Juris. Stat. at 17, citing Canfield, supra, 490 F.Supp. 1286 and Sheley v. Alaska Bar Assn., 49 U.S.L.W. 2273 (Oct. 28, 1980). See also Jensen v. Murphy, 49 U.S.L.W. 2338 (Nov. 25, 1980).

Notwithstanding that the issue raised in Gordon is an interesting one, nothing in that case, in Hicklin, or any of the other cases cited by Appellant requires a reversal of the decision in this case or mandates a re-examination of residency requirements for state bar admission in general. The summary affirmance of Wilson v. Wilson did precede Hicklin and Baldwin. However, subsequent to those decisions, this Court has reaffirmed

its long-standing policy of vesting substantial discretion in the licensing and regulation of lawyers to the states. Leis v. Flynt, 439 U.S. 438, 58 L.Ed.2d 717, reh. denied 441 U.S. 956, 60 L.Ed.2d 1060 (1979). As discussed below, Leis v. Flynt, while not dispositive here, is consistent with a finding that Hicklin requires neither a wholesale rejection of Wilson nor of the long line of cases which have upheld simple residency requirements, such as that in question in this case. In addition, the Gordon decision is distinguishable on its facts, is based on an erroneous and far too rigid reading of Hicklin and the Privileges and Immunities Clause, and applies Hicklin's functional analysis of that clause in a selective manner which

avoids case law clearly supporting the decision in this case. For all these reasons, Appellant's claims are unpersuasive and this appeal should be dismissed.

The decision in Gordon rests on the premise that after the decisions in Bates v. State Bar of Arizona, 433 U.S. 350, 53 L.Ed.2d 810 (1977) and Goldfarb v. Virginia Bar Ass'n., 421 U.S. 773, 44 L.Ed.2d 572 (1975), the practice of law was but a "commercial activity" which therefore fell within those "fundamental rights" which are "privileges" and "immunities." Gordon, 397 N.E.2d at 1312, n. 9. Finding this to be so, the Court concluded that such a commercial activity must be analogous to any other occupation, and that New York therefore could "not premise an

individual's right to engage in his chosen occupation within its borders solely on residence." Id. With all due respect for the Court of Appeals, this analysis is too simplistic a rejection of a long line of cases holding that the practice of law is not simply another occupation.

This Court has consistently ruled that the states retain substantial discretion and power over the grant of licenses to practice law and to establish reasonable rules and qualifications for admission. See Schware v. Board of Bar Examiners, 353 U.S. 232, 1 L.Ed.2d 796 (1957); Konigsberg v. State Bar of California, 366 U.S. 36, 6 L.Ed.2d 105 (1961); Law Students Research Council v. Wadmond, 401 U.S. 154, 27 L.Ed.2d

749 (1971); Baird v. Arizona, 401 U.S. 1, 27 L.Ed.2d 1, 27 L.Ed.2d 639 (1971); In Re Griffiths, 413 U.S. 717, 37 L.Ed.2d 910 (1973). This line of decisions conclusively established that the states have an "interest in the subject of regulating the legal profession" which is "legitimate and compelling," i.e., to secure an "informed, stable and responsible bar," Brown v. Supreme Court of Virginia, 359 F.Supp. 549, 557, (E.D.Va. 1973), aff'd. mem. 414 U.S. 1034 (1973), and that the practice of law was a matter of right only "for one who was qualified by his learning and moral character." Baird v. Arizona, 401 U.S. at 8.

The method exercised by the states to control the practice of law challenged in this case, i.e., residency,

came under sharp attack in the 1970's. As this Court's summary affirmance of Wilson v. Wilson, supra, which Appellant here questions, stands as the end point of those attacks, it is helpful to an understanding of the importance of that case to briefly review the development of the law regarding residency prior to Wilson.

A requirement of actual residency or of an intent to reside in a state at the time of the bar examination or of admission to the bar is a common qualification. As of May, 1979, all but five states imposed some form of residency requirement. See Note: A Constitutional Analysis of State Bar Residency Requirements Under the Interstate Privileges and Immunities Clause of Article IV, 92 Harv.L.Rev.

1461, at n. 3 (1979). These residency requirements generally were of two types: (1) "simple" (or residence merely at the time of admission or examination); and (2) "durational," or residency for a fixed period prior to application, examination or admission. Id. The development of the case law concerning these requirements in the 1970's demonstrates that while durational requirements did not withstand attack under the due process and equal protection clauses of the Fourteenth Amendment, U.S. CONST., amend. XIV, §1, on any ground, simple residency requirements (such as New Hampshire's) whether at examination or admission, or both, continued to withstand attack under both the

"rational basis" and "compelling interest" analyses of the Fourteenth Amendment, as well as the Privileges and Immunities Clause of Article IV.

The line of cases preceding Wilson and Gordon begins with Keenan v. Board of Examiners, 317 F.Supp. 1350 (E.D. N.D. 1970), Webster v. Wofford, 321 F.Supp. 1259 (N.D.Ga. 1970) and Lipman v. Van Zant, 329 F.Supp. 391 (N.D. Miss. 1971). In each of these cases, the lower federal courts struck down durational residency rules on equal protection and due process grounds. However, Keenan and Webster reserved consideration of, and Van Zant specifically approved, simple residency requirements requiring residency when applying for examination or admission. The rationale given in Van Zant for

approving such a requirement was its rational connection to an ability to question the applicant regarding character. Van Zant, 329 F.Supp. at 402.

Beginning with Van Zant and other cases decided from 1972 to 1974, simple residency rules were upheld in the face of attacks based on the theory that such requirements impaired the "fundamental right" or "interest" in travel set forth in Shapiro v. Thompson, 394 U.S. 618, 22 L.Ed.2d 600 (1979),[3] as well as on the theory that the

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[3]As the Van Zant court pointed out, in Shapiro this Court specifically reserved any ruling on residency requirements "to practice a profession" for the reason that "such requirements may promote a compelling state interest. ..." 329 F.Supp. at 403, citing 394 U.S. at 638, n. 21.

practice of law was itself a fundamental right giving rise to a more stringent standard of review. Suffling v. Bondurant, 339 F.Supp. 257 (D.N.M. 1972), aff'd. mem. sub nom. Rose v. Bondurant, 409 U.S. 1020, 34 L.Ed.2d 312 (1972)(upholding a six-month durational requirement on a rational basis analysis and, in dicta, on a compelling interest test); Kline v. Rankin, 352 F.Supp. 292 (N.D.Miss. 1972), vacated and remanded to a three judge court, 489 F.2d 387 (5th Cir. 1974)(upholding a challenge to a 90-day requirement); Brown v. Supreme Court of Virginia, supra, (upholding a requirement of residency for admission on motion on a rational basis and strict scrutiny test); Aronson v. Ambrose, 479 F.2d 75 (3rd Cir. 1973), cert. denied 414

U.S. 854, 38 L.Ed.2d 103 (1973)(upholding as rational a simple requirement of residency or intent to reside for admission); and Hawkins v. Moss, 503 F.2d 1171 (4th Cir. 1974), cert. denied 420 U.S. 928, 43 L.Ed.2d 400 (1975)(upholding a state reciprocity statute on a strict scrutiny analysis and under Article IV, §2). See also Harvard Note, 92 Harv.L.Rev. at 1462-1464.

As these residency requirements continued to be attacked, the courts provided differing, and more extensive, reasons for finding a compelling state interest in their continuance. Although, as the Gordon decision points out, the primary reason stated for upholding simply residency has been to allow the state to determine

character, this is not, contrary to that decision's logic, the only basis for upholding such rules.

In both Brown and Aronson, the courts expressed reasons which Gordon did not even address. In large part, the rationale of these cases was formulated on the basis of this Court's decision in Martin v. Walton, 368 U.S. 25, 7 L.Ed.2d 5 (1961). In Martin, this Court upheld a Kansas rule that non-residents associate with members of the Kansas bar when appearing in Kansas courts. The purpose of that rule (and the rule in Aronson) was to ensure knowledge of local customs and availability of counsel when required to answer court calls. In Brown, the Court recognized not only this factor but the fact that

residency ensures a responsible bar, with an interest in local practice and a necessity for familiarity with "local nuances." Brown, supra, 359 F.Supp. at 561-2. While the Brown court recognized that "residence, standing alone," would not ensure availability, familiarity and responsibility, it saw that as a reasonable factor to ensure such qualifications. Id.

Subsequent to these decisions but prior to Hicklin, two lower courts upheld simple residency requirements nearly identical to those under consideration here. In Wilson v. Wilson, supra, an Oregon rule requiring residency (or an intent to reside) at the time of admission was upheld.[4]

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[4]Like New Hampshire, the Oregon (cont)

Noting that the rule might have to be supported by a "compelling state interest," the court found such an interest both as applied to state residents and others who had to express an intent to reside in Oregon, citing Aronson, Brown and Suffling.

In Golden v. State Bd. of Law Examiners, 452 F.Supp. 1082 (D.Md. 1978), vacated 614 F.2d 943 (4th Cir. 1980) the court upheld a Maryland rule requiring residency at examination and admission. After an

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[4](cont.) Board of Bar Examiners had no specific rule requiring residency at admission. The state bar had, however, imposed such a requirement by interpreting the word "citizen" in the relevant Oregon statute to mean "resident." 416 F.Supp. at 986-7. The court saw such a requirement as being a reasonably necessary qualification.

extensive review of the law, the court based its decision both on equal protection and Privileges and Immunities grounds.

In 1977, after seven years of challenges to residency rules, this Court affirmed the simple residency rule upheld in Wilson. The significance of the foregoing cases is that they gave the Court substantial precedent for that affirmance. They consistently upheld simple residency rules against a compelling interest or strict scrutiny test. Thus, when the Court specifically considered a jurisdictional statement asserting a violation of the Privileges and Immunities Clause, as it did in Wilson, See Canfield, supra, its affirmance was consistent with the

grant of broad discretion to the states and the earlier findings of the lower courts that such rules could withstand scrutiny under a standard similar to the one later clarified in Hicklin.

Wilson and the earlier cases demonstrate that the simple residency test imposed here can withstand strict scrutiny under any standard, including that in Hicklin. Before discussing the New Hampshire rule against those standards, however, it is useful to ask whether, in light of Appellant's complete reliance on Gordon and Hicklin, those cases compel a reversal of Wilson or the earlier cases. The State submits that they do not, and that Wilson need not, and should not, be reconsidered.

Contrary to Appellant's assertions

here, and to the Gordon analysis, Hicklin v. Orbeck did not adopt a fundamentally new or "tough test" for scrutiny of laws under the Privileges and Immunities Clause, nor does Hicklin support Gordon's use of a rigid "fundamental rights" analysis.

Hicklin and Baldwin, supra, were decided in the same Term but applied different analyses and standards to Article IV, §2, which both decisions found to be without "precise contours." See Baldwin, 436 U.S. at 379, 56 L.Ed. 2d at 362. In Baldwin, Mr. Justice Blackmun relied to a large extent on a "fundamental rights" analysis of the Clause; but in dissent, Mr. Justice Brennan categorically rejected that test as "having no place in our

analysis of whether a State ... discriminat[es] against nonresidents." Id., 436 U.S. at 402, 56 L.Ed.2d at 377. As the author of the unanimous decision in Hicklin v. Orbeck, Mr. Justice Brennan did not apply a rigid fundamental rights analysis. Without mentioning such "rights," the Court applied a more functional test which required a case-by-case analysis.

The Hicklin standard now appears to govern. But that standard, although similar to a "strict scrutiny" or "compelling interest" test under the equal protection clause, is not a fundamental change in the law. It was derived from the decisions in Ward v. Maryland, 12 Wall. 418, 20 L.ed. 449 (1871) and Toomer v. Witsell,

334 U.S. 385, 92 L.ed. 1460 (1948), both of which dealt with the "right to pursue occupations" (language later considered dispositive in Gordon). As it was not a new test, but merely a restatement of an earlier one, the standard applied in Hicklin was well known to this Court when the Wilson case was decided and, if dispositive, presumably would have been applied to review the lower court decision there. Appellant's assumption that Hicklin compels a review of the Wilson decision in this case is therefore erroneous.

In light of the foregoing discussion of Hicklin, it is also important to note that the Gordon court misconstrued the Hicklin standard, a fact which further undercuts Appellant's

claim that Hicklin and Gordon compel reconsideration of the Wilson ruling here. In Gordon, the Court of Appeals, although recognizing the functional test applied in Hicklin, relied primarily on a "fundamental rights" analysis. The Gordon court concluded that after Bates and Goldfarb, the practice of law had to be considered an occupation covered by the rulings in Ward and Toomer, and therefore a "fundamental right" entitled to protection. But that conclusion overlooks the special treatment given to admission requirements for the practice of law by this Court and other courts prior to Hicklin, and the obvious fact that both Bates and Goldfarb were decided prior to this Court's summary affirmance of Wilson.

Again, if this Court had found Bates and Goldfarb to have changed the law in this area, it presumably would have ruled differently in Wilson.

The assumption of the Appellant and the Gordon Court that Bates, Goldfarb and Hicklin necessitate a different treatment of qualifications for the practice of law under the Privileges and Immunities Clause is also undermined by this Court's decision in Leis v. Flynt, 439 U.S. 438, 58 L.Ed.2d 717 (1979), which followed Hicklin. In Leis, the Court, acting per curiam, reversed without argument a Sixth Circuit decision holding that out-of-state attorneys had a cognizable property interest or right to appear pro hac vice in the courts of

Ohio where they were not admitted.

While Leis involves a discretionary right of the court, the decision is instructive here, for if Bates, Goldfarb and Hicklin require a change in the case law concerning bar admissions, it would appear that the Ohio rule prohibiting admission could not withstand scrutiny under Hicklin since non-residents were discriminated against in the practice of law. But this Court did not so hold. In upholding the Ohio rule, the Court seemingly rejected any such formalistic approach stating

> Since the founding of the Republic, the licensing and regulation of lawyers has been left exclusively to the States and the District of Columbia within their respective jurisdictions. The States prescribe the qualifications for admission

> to practice and the standards of professional conduct. They also are responsible for the discipline of lawyers.

439 U.S. at 442, 58 L.Ed.2d at 722 (footnote omitted). Moreover, the Court went beyond pro hac vice admissions to state:

> [T]here is no right of federal origin that permits such lawyers to appear in state courts without meeting that State's bar admission requirements. This Court, on several occasions, has sustained state bar rules that excluded out-of-state counsel from practice altogether or on a case-by-case basis. See Norfolk & Western R. Co. v. Beatty, 423 U.S. 1009, 46 L.Ed.2d 381, 96 S.Ct. 439 (1975), summarily affg. 400 F.Supp. 234 (S.D.Ill.); Brown v. Supreme Court of Virginia, 414 U.S. 1034, 38 L.Ed.2d 327, summarily affg. 359 F.Supp. 549 (E.D.Va.).

Id. This language, particularly the Court's citation of Brown, is a strong indication that this Court does not

view Hicklin, Bates and Goldfarb as compelling a review or reversal of the foregoing cases, including Wilson.

Even if the Appellant's argument that Hicklin and Gordon compel consideration of this case has some superficial appeal, it is negated by a further review of Gordon and of the facts of this case against the Hicklin standard.

Gordon is distinguishable on three principal grounds. First, it involved a durational residency requirement as to which there were clearly available alternatives. Moreover, New York's durational requirement mandated two six-month periods. Second, a record had been developed below but the state offered no support for the rule whatsoever. Here, although Appellant

has the burden of proof, absolutely no reason has been stated in support of his contention that the New Hampshire rule violates the Hicklin standard, and in the absence of such a record of that proof, the Hicklin test may not be applied. Third, Gordon considered only one rationale for the residency rule, the character of the applicant. A proper application of Hicklin would encompass other rationales such as those put forward in Brown v. Virginia Supreme Court.

Proper application of the Hicklin standard reveals that the residency rule here can withstand scrutiny under Article IV, §2. The requirement of residency at the time of the oath of admission applies equally to all applicants, resident or non-resident.

The "evil" with which it is concerned is addressed to non-residents, i.e., the rule addresses a concern that attorneys commit themselves to practice in this State for a period of time in order to: (1) learn local practices, nuances and rules; (2) be conscious of developing a reputation in what is now a small legal community; (3) possibly develop a continuing interest in New Hampshire; and (4) be available for court proceedings. In short, it fosters an "informed, stable and responsible bar." Brown, 359 F.Supp. at 557. While the rule does impose an obligation on non-residents, there is a compelling reason for doing so. This State has an interest in licensing its attorneys,

and has an interest not only in the stability of the bar, but in its expertise and in the ready access of its members to the people of this State and to the courts.

Finally, while it might be argued that the residency rule does not guarantee stability and local knowledge, since as Appellant points out, people may leave, that is not necessarily fatal. The State need not adopt every possible method of ensuring its goal, and clearly no vivid imagination is necessary to find a less restrictive means to almost any means of ensuring knowledge of local rules and practices. New Hampshire has adopted several, including mandatory courses for new lawyers. But one might seriously question whether in

the case of Mr. Drociak, who is in California, other means to the desired end such as mandatory courses, a percentage of hours practiced in-state each year or a requirement that attorneys answer docket calls without delay would be any less restrictive or more reasonable.

The rule in question does not ensure that an admittee practice in this State, but neither does it bind him to do so. It must therefore be concluded that the rule is neither overbroad nor unduly restrictive and does not violate the Privileges and Immunities Clause.[5]

---

[5]The foregoing discussion and the cases cited therein is completely dispositive of the equal protection argument addressed in Part I.B of the Jurisdictional Statement. Accordingly, the State will not discuss that issue further.

CONCLUSION

For the foregoing reasons, this Court should dismiss this petition and/or affirm the judgment of the New Hampshire Supreme Court.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE
NEW HAMPSHIRE SUPREME COURT

By its attorneys,

Gregory H. Smith
Acting Attorney General

Wilbur A. Glahn, III
Assistant Attorney General

December 19, 1980

APPENDICES

Appendix 1

THE STATE OF NEW HAMPSHIRE

PETITION FOR ADMISSION TO BAR EXAMINATION

To The Supreme Court:

I, (a) Joseph L. Drociak respectfully represent that I am a citizen of the United States residing in Manchester, New Hampshire, at No. 315 Manchester street (or that I am not a resident of New Hampshire but intend to become on on or about ..... and to live at .....);

. . .

Appendix 2

[Letterhead of the Clerk of Supreme Court]

1961
August 28

Mr. Joseph L. Drociak
2808 Rutgers Avenue
Long Beach, California

Dear Mr. Drociak:

Admissions to the bar in this state

are by personal appearance before the full Court and taking the oath in open court. While the successful candidates may be admitted, as you have been informed, August 30 at 10 A.M., if you are unable to be present at that time you may upon notice to this office be admitted on the first Tuesday of each month at 10 A.M. when the Court holds its regular sessions, provided you are a bona fide resident of this state when you present yourself for admission.

Very truly yours,

GOS/R

[With handwritten note in upper right hand corner: 8/30/61 Did not appear for admission.]

Appendix 3

2325 Ocean View Ave.
Los Angeles 57, Calif.
May 14, 1962

State of New Hampshire
Supreme Court
Concord, New Hampshire

Dear Mr. Shovan:

Confirming our recent telephone conversation please be advised that I was a successful candidate on the 1961 New Hampshire Bar Examination, however due to my location as a claim

representative of the Aetna Casualty & Surety Co. I was unable to be present to take the oath for admission to the Bar.

I am returning to New Hampshire on June 1, and respectfully request that I be permitted to take the oath on tuesday, June 5 in open court when the court holds it's regular session.

I am a native of Manchester and a domiciliary of New Hampshire having resided in Washington, D.C. while in attendance at Georgetown Law Center and in Los Angeles, Calif. while employed as a claim representative for the Aetna Casualty & Surety Co.. I am a registered voter in New Hampshire and have a joint interest in real property located in Manchester.

If any additional information is necessary, please advise.

Thanking you for your cooperation in this matter.

Sincerely yours,

[Joseph L. Drociak]

Joseph L. Drociak

Appendix 4

[Letterhead of the Clerk of Supreme Court)

1962
May 14

Miss Alma Stayton, Ass't Secretary
The Committee of Bar Examiners
1230 West Third Street
Los Angeles 17, California

Dear Miss Stayton:

Your records will disclose commication with this office concerning the admission to the bar of California of Joseph L. Drociak. Having passed the bar examination in this state last June 1961 he now desires to be admitted to the bar here.

Will you kindly inform me by return mail whether or not Mr. Drociak was admitted to the bar of California and if not the reason for his rejection. We would also appreciate information as to whether residence in the sense of domicile is a requirement for admission in California and if Mr. Drociak complied with this requirement.

Very truly yours,

GOS/R

Appendix 5

[Letterhead of The Committee of Bar Examiners of the State Bar of California]

May 16, 1962

George O. Shovan, Clerk
Supreme Court, State of New Hampshire
Concord, New Hampshire

Dear Mr. Shovan:

Acknowledgement is made of your letter of May 14, 1962, regarding JOSEPH L. DROCIAK, an applicant for admission to practice law in California.

Mr. Drociak took our March 1962 bar examination. The results of that examination have not been released and so we do not know whether he was successful. The residence requirement in this state is statutory and cannot be waived or relaxed for any reason. Mr. Drociak has stated under oath that he established bona fide residence in California on July 15, 1961, and following is a statement of the facts upon which he bases his claim to have established such residence: "After graduation from law school I came to California and have taken permanent employment as a claims representative with the Aetna Ins. Co. Have also rented an apartment and have given up N.H. residence." This was sufficient to satisfy our requirement. Applicant's current residence address according to our records is: 2325 Ocean View Avenue, Los Angeles 57, California. His current employment is: Aetna Casualty Insurance Company, 2404 Wilshire Boulevard, Los Angeles 57.

If there appears to be any conflict in the statements made by this applicant to our Committee and those made regarding his New Hampshire admission, we should appreciate being advised immediately. If applicant passes the March examination in this state, in all probability he will be scheduled to take the attorney's oath about June 7th.

Very truly yours,

[Alma Stayton]

Alma Stayton,
Assistant Secretary.

AS:ja

Appendix 6

[Letterhead of the Clerk of Supreme Court]

1962
May 21

Mr. Joseph L. Drociak
2325 Ocean View Avenue
Los Angeles 57, California

Dear Mr. Drociak:

In accordance with our telephone conversation of May 11, 1962, you may be admitted to the bar of this state when the Court next convenes in regular session, June 5, at 10 A.M., provided you are a bona fide

resident of this state on that date.

On the question of residence, this office has a communication dated May 16, 1962 from the Assistant Secretary of the Committee of Bar Examiners for the State Bar of California, disclosing that you informed that Committee that "After graduation from law school I came to California and have taken permanent employment as a claims representative with the Aetna Ins. Co. Have also rented an apartment and have given up N.H. residence."

You informed me in your telephone conversation that you have continued to maintain your domicile in New Hampshire and that you presently have a domicile here.

Will you kindly explain by return air mail this apparent conflict on the question of your bona fide intention of making New Hampshire your home.

Very truly yours,

GOS/R

[With handwritten note in upper right hand corner: Tel. Call. 5/24/62 admits he has no domicile here wants to be admitted in Calif. will write if wants to be admitted at some future time here. Will not appear June 5th. G.S.]

Appendix 7

2325 Ocean View Ave.
Los Angeles 57, Calif.
May 31, 1962

Mr. George O. Shovan
State of New Hampshire Supreme Court
Concord, New Hampshire

Dear Mr. Shovan:

As per our recent telephone conversation, this is to inform you that I shall not be present on June 5 to take the oath as due to my present location I would not qualify as a bona fide resident of New Hampshire at that time.

Thanking you for your cooperation in this matter.

Sincerely yours,

[Joseph L. Drociak]

Joseph L. Drociak

Appendix 8

Excerpts from Memorandum of Fact and Law in Support of Motion to Take Oaths dated October, 1979

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

OCTOBER TERM, 1979

In re Joseph L. Drociak

Memorandum of Fact and Law in Support of Motion to Take Oaths

II. Law.

This matter raises the following issues of law: ...

A. Issues.

1. Whether petitioner is qualified under RSA 311:2 and the related Supreme Court Rules to take the "oaths" set forth in RSA 311:6 so as to be permitted to practice law in New Hampshire.

2. Whether application of RSA 311:2 and Supreme Court Rule 15 so as to require petitioner to be a New Hampshire resident on the date he takes the oaths unconstitutionally infringes on petitioner's federal rights to equal protection, due process of law, and interstate travel. [page 3]

. . .

Petitioner wishes to address one further question which Mr. Pappagianis had raised in discussions with petitioner's counsel; that is, the effect, if any, of the lapse of time between petitioner's passing the examination and September 1977 when he requested permission to take the oaths. On the facts of the matter at issue, such lapse of time should have no

effect on his right to take the oaths. [page 63]

. . .

Further, petitioner is in no way challenging the constitutionality of the residency requirement of RSA 311:2 or of related rules per se. Petitioner believes that the requirement that one be or file an intention to become a New Hampshire resident when he applies to take the state's bar examination is reasonable. [page 65]

. . .

Appendix 9

Excerpts from Motion to Take Oaths Filed by Appellant with the New Hampshire Supreme Court on October 11, 1979

WHEREFORE, Mr. Dròciak requests that the court:

A. Order a factual hearing, if any relevant factual matters are in dispute, at which he and others be allowed to testify;

B. If no relevant factual matters are in dispute, allow petitioner the opportunity to submit a more detailed brief on various points of law and if advisable, allow the Committee of Bar Examiners the opportunity to submit an opposing or amicus curiae brief;

C. If advisable, allow an opportunity for the petitioner and other interested parties to be heard orally thereon;

D. After considering all matters raised, order that Mr. Drociak be permitted to take the oaths set forth in RSA 311:6 and to practice law in this state;

E. If the court should not allow Mr. Drociak to take such oaths, issue a declaratory judgment to the effect that: i) if Mr. Drociak were presently to become a New Hampshire resident (including an enumeration of the requirements for becoming a New Hampshire resident) and found morally fit, he would be allowed to take such oaths and practice law in New Hampshire; and ii) based upon Mr. Shovan's remarks to Mr. Drociak in 1961, the lapse of time between his passing the bar examination and his request of September 1977 is, on the facts presented, in and of itself no bar to being allowed to take the oaths and practice law in this state;

F. If a declaratory judgment is not issued pursuant to request (E) above, issue a statement as to the conditions which the petitioner must satisfy to be permitted to take the oaths and practice in New Hampshire; and

G. For such further relief as may be just.

Appendix 10

Excerpts from Appellant's Supplementary Memorandum of Law filed with the New Hampshire Supreme Court on February 22, 1980

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

FEBRUARY TERM, 1980

79-323
In Re Joseph L. Drociak

SUPPLEMENTARY MEMORANDUM OF LAW

. . .

II. Law

In addition to the two issues raised in the Memorandum of Fact and Law, this matter involves the following legal issue:

A. Issue

Whether under RSA 311:2 and Supreme Court Rule 15 exclusion of petitioner from the New Hampshire bar based solely upon his lack of New Hampshire residence violates the privileges and immunities clause of Article IV of the Federal Constitution.

Appendix 11

Excerpts from Petition and Questionnaire for Admission to the Bar of New Hampshire

SUPREME COURT OF NEW HAMPSHIRE

PETITION AND QUESTIONNAIRE FOR ADMISSION TO THE BAR OF NEW HAMPSHIRE

. . .

(g) If you are not a resident of New Hampshire, give the date by which you intend to become a resident and the name of the municipality in which you intend to reside: .....
.....
Admission to the bar will not be permitted until applicant proves good faith residency in the sense of domicile in New Hampshire.

. . .

28 U.S.C. §1257(2)

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

. . .

(2) By appeal, where is drawn in question the validity of a statute of

any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

New Hampshire Supreme Court Rule 10, NH RSA 490:App. R. 10

REHEARING.

10. Motions for rehearing will not be entertained unless made in writing, briefly stating the points upon which a rehearing is desired, and filed with the clerk within ten days after he notifies the parties of the order in the case, as required by law. See Rule 3 as to copies.